Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

OFFICER TYRONE TATE,

Petitioner,

v.

MICHAEL KOPEC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case presents an application of this Court's two-pronged qualified immunity test, as set out in *Saucier v. Katz*, 533 U.S. 191, 121 S. Ct. 2151 (2001) and as further developed in *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508 (2002), in the context of an excessive force claim alleging a failure to loosen tight handcuffs. The questions which this case presents are:

1) Whether the Court properly found that it was clearly established that the Fourth Amendment applied to the use of tight handcuffs during an arrest simply because the Fourth Amendment has been held to apply, in general, to the manner in which arrests are made.

2) Whether this Court should resolve the split in the Federal Circuit Courts of Appeals on the issue of whether an excessive force claim can arise from the failure to loosen handcuffs and, if so, whether any additional factor or element must be shown to substantiate the claim, for purposes of the first prong of the qualified immunity test.

PARTIES TO THE PROCEEDING

The parties to this proceeding in the Third Circuit Court of Appeals were the plaintiff, Michael Kopec, and defendant, Officer Tyrone Tate. The Township of Whitemarsh was a defendant in the district court. Summary judgment was granted as to the township, which the plaintiff did not appeal.

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OPINIONS BELOW

Petitioner seeks review of the order and opinion of the United States Court of Appeals for the Third Circuit, filed on March 17, 2004. The opinion of the Court of Appeals in this case appears at 361 F.3d 772. (App. A) The unreported memorandum opinion and order of the district court, dated October 16, 2002, is set forth as Appendix B. On April 20, 2004, the Court of Appeals denied petitioner's request for rehearing. (App. C)

STATEMENT OF JURISDICTION

This Honorable Supreme Court has jurisdiction of the instant petition pursuant to 28 U.S.C. § 1254(1). (App. C)

The Court of Appeals had jurisdiction of this matter pursuant to 28 U.S.C. § 1291. The District Court had jurisdiction of it action pursuant to 28 U.S.C. §§ 1331 and 1343 and the Federal Civil Rights Act, 42 U.S.C. § 1983.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW

On February 3, 2000, the plaintiff Michael Kopec and his then-girlfriend, Pamela Smith, were at her apartment when they decided to venture onto a frozen pond located in the middle of the apartment complex, even though the pond was off-limits and surrounded by a fence. The plaintiff jumped the fence to get onto the pond, and Ms. Smith squeezed through a fence opening. Once they got onto the pond, they began to slide and horse around on the ice.

Office Tyrone Tate of the Whitemarsh Township Police Department arrived on the scene approximately 30-45 minutes later. He had received an anonymous call at 11:20 p.m. indicating that two people were walking on the private lake. Officer Tate asked the plaintiff and Ms. Smith to leave the fenced-in area, which they did.

There was no dispute that Michael Kopec and Pamela Smith were trespassing on this property. In order for Officer Tate to fill out the appropriate paperwork on the call he

received, he required the plaintiff's and Ms. Smith's names and addresses. The plaintiff later admitted that Officer Tate was probably not going to charge them with criminal trespass and probably would have let him and Ms. Smith go on their way, but the plaintiff nonetheless repeatedly refused to give Officer Tate his name.

Officer Tate indicated to the plaintiff that he was going to arrest him, at which point the plaintiff replied, "I guess you got to do what you got to do . . ." The plaintiff put both hands forward and Officer Tate handcuffed him.

The plaintiff has alleged that he asked that the handcuffs be loosened because they were tight. However, at this point in the encounter, the plaintiff did not tell Officer Tate that he was in pain, instead, he taunted Officer Tate by rhetorically asking him if putting handcuffs on tightly was what he did to arrestees who did not give their names. Moreover, at this time Officer Tate was involved in legitimate police business, as he was continuing his investigation by questioning Ms. Smith.

Officer Tate testified that, based on his experience and given the lack of urgency in the plaintiff's voice, he initially did not believe that the plaintiff was in pain, but believed that any discomfort the plaintiff felt was based on the low temperature.

Q: The first time he complained you said you ignored him. Why is that?

A: Not that I ignored him. I mean I heard him say it. I didn't know if he was serious or not serious. If he was serious, I knew he would have told me in a

> stronger way and it's just a feeling out there that this guy is in handcuffs, is that because his hands were cold, because his hands were frozen like everyone else's were.

Immediately after Ms. Smith gave Officer Tate the plaintiff's full name, the plaintiff screamed and fell to his knees in the snow. At that point, Officer Tate was first on notice that the handcuffs might be causing pain, but he believed that the plaintiff might not actually be hurt, but merely acting. He nevertheless checked them.

> Q: How did you know he was on his knees?
>
> A: I heard him, you know, he screamed out, these hurt, these hurt, something to that effect. Then I remember turning and going to him and thinking they either hurt or he's acting. I didn't know which, you know, and it was just better for me to check.
>
> * * *
>
> Q: Did you make any observations that would indicate to you that he was acting?
>
> A: Well, he could have been. It was one of two things, either they were irritating him or he was acting. I didn't know which, so I wanted to be safe and see if they were irritating him, which is why I went to check him.

In all caution, the handcuffs were loosened. "[I]t wouldn't have done any good if I checked it and didn't agree with him or not. He say they were troubling him, so it was my opinion to take them off and redo them."

The entire encounter lasted between four and ten minutes. After the cuffs were removed, the plaintiff was placed in the police car and taken to the Whitemarsh Township Police Station. The plaintiff was arrested and issued a citation for trespassing, reduced to disorderly conduct.

The plaintiff subsequently filed this suit, alleging that Officer Tate and Whitemarsh Township violated his constitutional rights. The District Court had jurisdiction over the action pursuant to 28 U.S.C. §§ 1331 and 1343 and the Federal Civil Rights Act, 42 U.S.C. § 1983. The complaint alleged that Officer Tate used excessive force against the plaintiff by failing to loosen the handcuffs during his arrest. The complaint also alleged that the arrest and tight handcuffs were retaliation for the plaintiff not giving Officer Tate his name.

The defendants filed a motion for summary judgment on July 16, 2002. The motion argued that Officer Tate was entitled to qualified immunity, that there was no constitutional violation supporting the retaliation claim, and that Officer Tate was entitled to the immunity of the Pennsylvania Tort Claims Act. Moreover, the claims against the Township should be dismissed because the plaintiff could not show any involvement of the Township regarding, policies, training or otherwise. The plaintiff did not contest the dismissal of the claims against the municipality.

Judge J. Curtis Joyner of the District Court for the Eastern District issued his decision granting summary judgment to the defendants on October 22, 2002. (App. B, 31a-38a) In his Memorandum and Order, Judge Joyner found that Officer Tate was entitled to qualified immunity because, under the particular facts of this case, the actions of the defendant were not such that a reasonable officer would find

them unlawful. (35a-36a) Further, the plaintiff's claim for retaliation was also found to fall under qualified immunity, because the plaintiff failed to present any evidence to show that the defendant could have believed that he was acting unlawfully. (37a)[1]

The plaintiff appealed to the Third Circuit Court of Appeals. The appeal was heard by Judges Theodore McKee, D. Brooks Smith, and Senior Judge Morton Greenberg. After briefing and oral argument, the Court published its opinion on March 17, 2004. Over the dissent of Judge Smith, the Court reversed the decision of the district court, denied qualified immunity, and remanded the case to the district court. (App. A, 1a-30a)

The majority first held that the fact alleged by the plaintiff were sufficient to establish a violation of a constitutional right, because, in the majority's view, the officer was not in a dangerous situation.

> In reaching our conclusion that Kopec has asserted facts that if proven would establish that there had been a violation of his constitutional rights, we point out that Officer Tate faced rather benign circumstances that hardly justified his failure to respond more promptly to Kopec's entreaties, at least to the extent to ascertain if the handcuffs were too tight. Officer Tate was not, after all, in the midst of a dangerous situation involving a serious crime or armed criminals. Accordingly, this opinion should not be overread as we do not intend to open the floodgates to a torrent of handcuff claims. Thus, if Officer Tate had been

1. The state law claims were also dismissed.

> engaged in apprehending other persons or other imperative matters when Kopec asked him to loosen the handcuffs our result might have been different.

(10a) There was no evidence, however, that Officer Tate had determined that the plaintiff and Ms. Smith were, in fact, unarmed, or that no crime more serious than trespassing had occurred.

Further, the majority concluded that the right was clearly established, because the Fourth Amendment had previously been held to extend to the manner in which an arrest was made, and handcuffing is part of the manner in which an arrest is made.

The Court stated:

> With respect to the second inquiry on qualified immunity, it cannot be said as a matter of law that a reasonable officer would not have known that this conduct was in violation of the Fourth Amendment even though it appears that neither the Supreme Court nor this court has ruled that a police officer may be using constitutionally excessive force in tightening handcuffs. The Court of Appeals for the Ninth Circuit has noted that at least as early as 1985 the use of excessive force by officers in effectuating an arrest was clearly proscribed by the Fourth Amendment as it held . . . that "the Fourth Amendment governs not only whether a person or thing is subject to a 'seizure,' but also 'the manner in which a seizure is conducted.'"

(10a-11a)

Judge Smith filed a dissenting opinion. In his opinion, he first recognized that the plaintiff's initial complaints to Officer Tate failed to indicate that he was in pain.

> Kopec's initial statement to Officer Tate did not communicate anything more than a complaint about tightness. From the perspective of a reasonable officer, it would not have been unusual for an arrestee to initially request that the cuffs be adjusted or loosened. Handcuffs, by their very nature, are restrictive, uncomfortable, and unfamiliar to most individuals. Although Kopec affirmed during his deposition that he experienced a loss of feeling within about ten seconds of being cuffed, careful reading of his testimony reveals that he did not express this to Officer Tate.
>
> Kopec's second request to have the cuffs removed was also devoid of any suggestion that the cuffs were too restrictive or were causing him pain . . .

(21a-22a) As soon as Officer Tate was aware of the complaints of pain from the handcuffing, he moved a reasonable time thereafter to ameliorate the situation.

> Viewed from the perspective of a reasonable officer, Tate's conduct was not, in my view, unreasonable. He was constitutionally permitted to apply some force in arresting Kopec. After receiving notice that the force applied by the cuffs may have been excessive, Officer Tate responded reasonably.

* * *

> In my view, the totality of the circumstances considered by the majority has not adequately taken into account the fact that there was only one officer at the scene, and that he was occupied with another task that was a legitimate police duty.

(22a-23a) In his opinion, Judge Smith also disagreed with the manner in which the majority concluded that the law was clearly established, because the majority applied an expansive and general principle. In Judge Smith's view, the majority's analysis is flawed, "because it fails to determine what the contours of the right were, and neglects to recognize that the law did not provide Officer Tate with fair warning that he was required to respond more promptly than he did to Kopec's complaint that the handcuffs were too tight." (14a-15a) He stated further:

> Although my colleagues have employed the two-part test set forth in *Saucier*, I do not believe that their reliance on only the Fourth Amendment's broad, general proscription against the use of excessive force is sufficient because it fails to take into account the situation confronting Officer Tate.
>
> Supreme Court qualified immunity jurisprudence has long required that courts undertake a particularized inquiry. In the seminal case of *Anderson*[*v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034 (1987)], the Supreme Court observed that the determination of whether there is qualified immunity depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. . . . The Court recognized that if the test were applied at a general level, as I believe

> the majority does here, then "plaintiffs" would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability . . .

(25a-26a)

The defendant filed a timely petition for rehearing. On April 20, 2004, the Court issued its order denying the petition. This petition follows.

REASONS FOR GRANTING THE PETITION

Rule 10 of the Supreme Court Rules address the type of compelling situations this Court favors when exercising its prerogative in issuing a writ of certiorari. They include when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," or when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." SUP. CT. R. 10(a), (c).

Hope v. Pelzer, 536 U.S. 730, 122 S. Ct. 2508 (2002) established that there need not be a case directly on point for the law to be considered "established" for qualified immunity purposes. This case examines the opposite end of the question, and asks whether general and non-specific principles of law may be relied upon to "clearly establish" the law.

In addition, this case also calls for this Court to resolve the split in the Circuits as to when a claim of the use of excessive force can stem from the failure to loosen tight handcuffs, and whether any additional factors or elements are required to state such a claim.

A. Whether A Specific Constitutional Right Can Be "Clearly Established" By Virtue Of Broadly Established Principles Is An Important Question Requiring This Court's Attention.

The writ of certiorari should be granted by this Court because it squarely presents an important issue of federal law with significant practical consequences.

The Third Circuit Court of Appeals in this case concluded that the failure to immediately loosen the allegedly tight handcuffs was a violation of a constitutional right and that this right was clearly established. This was clearly established in the Court's view, not because there was any precedent establishing that an excessive force claim can arise from the failure to loosen tight handcuffs, but because it is clearly established that the manner in which an arrest is made is subject to the Fourth Amendment. Thus, under this reasoning, the Fourth Amendment effectively applies to any claim which in any way involves the manner in which an arrest is made, regardless of whether there is any case law or other decision addressing the specific facts at issue.

Government officials exercising discretionary functions have qualified immunity from suits seeking damages under [42 U.S.C.] § 1983 "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982).

The second prong of the qualified immunity test asks whether the right alleged to have been violated was clearly established at the time of the incident in question. This Court, in *Anderson v. Creighton*, 483 U.S. 635, 107

S. Ct. 3034 (1987), and *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151 (2001), established that to be "clearly established," the right must be established more then just as a general proposition.

This Court established that is not enough that the right alleged to be violated was established as a general proposition. "[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violated that right." *Saucier*, 533 U.S. at 202, 2156, *quoting Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 (1987). In order for the right allegedly violated to have been clearly established, the contours of that constitutional right must be "sufficiently clear that a reasonable officer would understand that what he is doing violates that right." *Hope*, 536 U.S. at 739, 122 S. Ct. at 2515 *quoting Mitchell v. Forsyth*, 472 U.S. 511, 535, 105 S. Ct. 2806, 2820 (1985). The unlawfulness must be apparent in light of the then existing law. *Id.*

"This inquiry, it is vital to note, must be undertaken ***in light of the specific context of the case, not as a broad general proposition***; and it too serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable." *Saucier* 533 U.S. at 201, 2156, (emphasis supplied.)

If the law does not put the officer on notice that his actions would be clearly unlawful, qualified immunity must be granted, because qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096 (1986).

In *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508 (2002), this Court firmly established that public officials can be on notice that their conduct violates clearly established law, for purposes of the second prong of the qualified immunity test, even in the absence of case law which is fundamentally or materially similar to the facts at issue, so long the decisions relied upon give reasonable or fair warning that the conduct violates constitutional rights.

This case picks up where *Hope* left off by asking how specific must those decisions be in order for there to be reasonable or fair warning. In other words, recognizing that *Hope* does not require an absolute specificity or identity between the actions of the official and the previous decisions relied upon for the law to be clearly established, at what point are the established decisions too broad and disconnected from the official's specific acts under review to give the official fair warning, thus mandating that qualified immunity be granted.

This is an important issue. *Hope* showed the district and circuit courts that the second prong of the test required more than a limited search for binding precedent on the exact or similar factual situation. With the decision in this case, however, the Third Circuit has seemingly taken *Hope* to an unnatural extreme. Not only did the Court not point to any decision directly on point, it grounded its conclusion that the law was clearly established simply on the fact that the manner in which an arrest is made is subject to the strictures of the Fourth Amendment.

In *Hope*, this Court discussed how it can be established that the "unlawfulness" is apparent, and this Court accepted the requirement of "fair notice" familiar under § 1983's

criminal analogue, 18 U.S.C. § 242. *Hope*, 536 U.S. at 739, 2515. The *Hope* Court confirmed that an officer sued under § 1983 has the identical right to fair notice that the alleged conduct is unlawful as a defendant charged with violation of § 242. *Id. United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219 (1997) detailed the three aspects of the fair notice requirement: First, the vagueness doctrine, which bars the enforcement of a criminal statute which describes the prohibited activities in terms such that a reasonable person must guess as to what is precluded; second, the canon of strict construction, which ensures that ambiguity is resolved in favor of permitting prosecution for only conduct which is clearly covered by the statute; and finally, the due process requirement, which bars courts from applying novel constructions of criminal statutes to conduct which neither the statutes themselves or prior decisions have disclosed as being precluded. *Id.* at 266-267, 1225.

The fair warning requirements mandate that § 242 applies (and, by extension, qualified immunity in a § 1983 action is denied) only when an unclouded view of the law includes the acts alleged as clearly within that area proscribed by the Constitution. *Lanier* also established that, for purposes of § 242 liability, in order for an officer to have fair warning, there is no requirement that there be case law that is "fundamentally similar" in nature to that under review. *Id.* at 269, 1227.

This Court applied those concepts developed in *Lanier* to the civil law context under § 1983 in *Hope*, and concluded that so long as "the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights,"

then that law will be considered to be "clearly established." *Hope*, 536 U.S. at 740, 2515. The *Lanier* Court affirmed that:

> . . . general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has not previously been held unlawful"

Lanier, 520 U.S. at 271, 1227, quoting *Anderson*. Thus, *Hope* established that "fundamentally similar" case law is not required, but general statement of the law are sufficient to "clearly establish" a constitutional right. But there is a tension, because *Anderson* and *Saucier* established that the inquiry must be made in the specific context of the case. The issue in this case is in some ways the compliment of *Hope*, because it asks whether the general statement of law relied upon to declare a right firmly established can be so general as to implicate the fair notice requirements.

The parties in this case agreed that there is no law on point from this Court or the Third Circuit Court of Appeals on the issue of whether a Fourth Amendment claim can stem from the failure to loosen tight handcuffs. Indeed, in a recent decision, albeit unpublished, the Third Circuit upheld a grant of qualified immunity in a handcuffing case, and noted that the law in this area was not established even in a general sense:

> In its analysis of the second step, i.e., whether the constitutional right was clearly established, the district court fully surveyed the state of the law

> and determined that, at the time of the incident, the question of whether tight handcuffing constitutes a violation of Fourth Amendment rights against excessive force was not established even in a general sense. Therefore, it clearly was not established in the particularized sense required for qualified immunity.
>
> We find no error in the district court's *Saucier* analysis. Quite frankly, if the various circuit courts of appeals and the district courts disagree on the question, we can hardly fault Officer Rogge, especially since it is apparent that he was dealing with a thoroughly uncooperative person who had been arrested for drunk driving.

Istvanik v. Rogge, 50 Fed. Appx. 533, 537, 2002 U.S. App. LEXIS 22436, **7-8 (3d Cir. 2002) (unpub.)[2]. However, rather than examining the issue in the particularized, relevant sense, and determining whether fair notice was given on the issue of whether the failure to loosen handcuffs amounts to excessive force, the Third Circuit majority concluded that since the Fourth Amendment applies to preclude excessive force in the manner in which an arrest is made, a Fourth Amendment claim stemming from tight handcuffing during an arrest is therefore clearly established.

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2. Judge McKee, part of the majority in this case, authored the *Istvanik* opinion. Given that the case law did not appreciably change between the issuance of the *Istvanik* memorandum and the opinion in this case, this apparent inconsistency is peculiar.

The majority's reasoning in this case is very similar to reasoning previously rejected by this Court.

In *Wilson v. Layne*, 526 U.S. 603, 119 S. Ct. 1692 (1999), this Court was tasked with determining whether the presence of media personnel during the execution of warrant, as a violation of the Fourth Amendment, was clearly established, and stated, "[i]t could plausibly be asserted that any violation of the Fourth Amendment is 'clearly established,' since it is clearly established that the protections of the Fourth Amendment apply to the actions of police." *Id.* at 615, 1699. This level of generality was rejected as being too insufficiently precise. "However, as we explained in *Anderson*, the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Id.*

This Court in *Wilson* cautioned that police officers are not expected nor required to predict how the law will evolve.

> Given such an undeveloped state of the law, the officers in this case, the officers in this case cannot have been "expected to predict the future course of constitutional law." . . . If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.

Id. at 617-18, 1700-01. Judge Smith's dissent in this case shows that it is reasonable for an experienced, learned jurist to conclude that no constitutional violation occurred on the facts of this case. If three judges cannot agree, after the fact,

whether Officer Tate's actions were unconstitutional, it defies belief to say that the unlawfulness of his acts should have been clearly apparent to him, in the heat of the moment.[3]

This case begins were *Hope* ends, by asking whether an officer is given fair notice and whether the law is clearly established for purposes of qualified immunity when his action has been found to be unlawful only in the most general fashion and by asking when the issue is defined so broadly as to eliminate fair warning. Because of the important and practical issues raised by the standards employed by and the analysis of the Court of Appeals in this case, this Honorable Court is respectfully requested to issue a writ of certiorari.

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3. The majority's reasoning is also clearly contrary to *Saucier*, because it fails to distinguish between the two prongs of the qualified immunity test. Under the standard employed by the Third Circuit, the two prongs of the qualified immunity test effectively collapse into a single question when the issue is in any way connected with an arrest—namely whether the facts could establish a violation.

Prior to *Saucier*, of course, the objective reasonableness test was being fused with the evaluation to determine whether qualified immunity should be granted. The issue before the *Saucier* Court was whether it was proper to collapse the two questions in the qualified immunity test. The Ninth Circuit had held that the *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865 (1985) "objective reasonableness" test was co-extensive with the second prong of the qualified immunity test, inquiring whether a reasonable officer could believe that his conduct was lawful. The qualified immunity test collapsed into one question, namely whether the facts could establish a violation.

In *Saucier*, this Court, of course, insisted that the two prongs are separate and cannot be collapsed into a single question. *Saucier*, at 200, 2155.

B. This Court Should Resolve The Split In The Circuits Regarding Whether An Excessive Force Claim Can Stem From The Failure To Loosen Tight Handcuffs.

This Court should also grant certiorari in this case because of a split in the Federal Circuit Courts of Appeals on the question of whether and to what extent an excessive force claim can stem from the alleged failure of an officer to loosen tight handcuffs. The cases decided by the circuit courts have shown a disagreement on whether such a claim is viable, and, if so, whether any additional factors—such as the presence of an injury or the extent of an officer's knowledge—are necessary to sustain the claim.

The qualified immunity test first asks whether a constitutional right has been violated on the facts alleged. *Saucier*, 533 U.S. at 201, 2156. If the failure to loosen allegedly tight handcuffs, given all the facts of the case, does not amount to a violation of a constitutional right, then qualified immunity must be granted.

A claim of excessive force under the Fourth Amendment must be analyzed by the objective reasonableness of the action. The test asks whether, under the totality of the circumstances, "the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivations." *Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 1872 (1985). Furthermore, the facts of the case must be viewed from the point of view of the officer on the scene, and not retrospectively:

> the "reasonableness" of a particular use of force must be judged from the perspective of a

> reasonable officer on the scene, rather than with the 20/20 vision of hind-sight . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

Id.

However, the Courts of Appeals wildly diverge in their opinions as to when and if the failure of an officer to loosen handcuffs can lead to a viable excessive force claim. This Court's review is essential so as to keep the federal law uniform among and between the Circuits, and to resolve the split that has arisen regarding these constitutional principles.

In this case, the majority cited to the Ninth Circuit's case of *Palmer v. Sanderson*, 9 F.3d 1433 (9th Cir. 1993), for the contention that, in the context of loosening tight handcuffs, "no reasonable officer would believe that the abusive application of handcuffs was constitutional." *Id.* at 2436. The Ninth Circuit Court of Appeals, in fact, represents one extreme—flatly holding that an excessive force claim can result from the use of tight handcuffs. *LaLonde v. County of Riverside*, 204 F.3d 947, 960 (9th Cir., 2000) ("A series of Ninth Circuit cases has held that tight handcuffing can constitute excessive force.")

However, other circuit courts have not taken the same blanket approach as the Ninth Circuit. Most notably, the Tenth Circuit Court of Appeals, in *Hannula v. City of Lakewood*, 907 F.2d 129 (10th Cir. 1990), represents the opposite end of

the spectrum on the specific question at issue here, stated that "while loosening tight handcuffs may be the most compassionate action, the failure to do so does not rise to a clearly established constitutional violation." *Id.* at 132.

Between these two extremes, the various circuit courts are at odds in determining what is sufficient to establish such a claim, and what additional allegations, if any, are necessary to sustain the claim.

The Third Circuit's position, based on this case, appears to be that no requirement is needed to present a viable claim, except if the situation is "dangerous," or the officer is involved in other "imperative" matters (which necessarily does not include interviewing another suspect.) (10a) This would seem to be as broad as the Ninth Circuit's take on the issue.

The Fourth Circuit would not permit the claim to proceed only on a complaint of pain. In *Carter v. Morris*, 164 F.3d 215 (4th Cir. 1999), the Court stated that the plaintiff's excessive force claim based on tight handcuffing was "so insubstantial that it cannot as a matter of law support her claim under the Fourth Amendment . . . or the Fourteenth." *Id.* at 219 n.3 (internal citations omitted). The Court in *Carter* cited, as support, *Martin v. Gentile*, 849 F.2d 863 (4th Cir. 1988), and *Riley v. Dorton*, 115 F.3d 1159 (4th Cir. 1997). In *Riley*, as in *Carter*, the court took an intermediate position and affirmed the grant of qualified immunity where the painful handcuffing produced no injury. *Riley*, 115 F.3d at 1167.

Likewise, the First Circuit also appears to require, at a minimum, the presence of an injury to sustain the claim.

In *Gonzalez v. Benito*, 1994 U.S. App. LEXIS 25609 (1st Cir. 1994) (unpub.), the court held that "tight handcuffs standing alone are not enough to proceed to trial on a constitutional claim." *Id.* at *4. But, in *Bastien v. Goddard*, 279 F.3d 10, 14-15 (1st Cir. 2003), the court held that there was no requirement that the injury be "serious" in order to proceed, implying that some injury is necessary. *Cf.*, *Pena-Borrero v. Estremeda*, 365 F.3d 7, 12 (1st Cir. 2004) (handcuffing during arrest pursuant to faulty warrant which resulted in exacerbation of pre-existing injury, insufficient to state a claim.)

However, the Fifth Circuit Court of Appeals has granted qualified immunity, even in the presence of pain and some injury. In *Glenn v. City of Tyler*, 242 F.3d 307 (5th Cir. 2001), the Court stated that "handcuffing too tightly, without more, does not constitute excessive force." *Id.* at 314. *See also Wesson v. Oglesby*, 910 F.2d 278, 284 (5th Cir. 1990) (delay in treatment where tight handcuffs caused swollen, bleeding wrists does not establish Eighth Amendment claim.) In *Gold v. City of Miami*, 121 F.3d 1442 (11th Cir. 1997), the Eleventh Circuit Court of Appeals also affirmed the granting of qualified immunity, even though the plaintiff experienced pain and injuries. *Id.* at 1446-47. The Court stated that twenty minutes of pain, and abrasions on the plaintiff's wrists would not "inevitably lead" an officer to conclude that his use force was unlawful. *Id.*

Likewise, the Eighth Circuit requires the presence of severe, permanent injury in order for a claim to be established. The Court in *Crumley v. City of St. Paul*, 324 F.3d 1003, 1008 (8th Cir. 2003), held that excessively tight handcuffing which resulted in an injured, bleeding wrist was insufficient

to state an excessive force claim. *Crumley* relied on *Foster v. Metropolitan Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir. 1990), where the Court held that "allegations of pain as a result of being handcuffed, without some evidence of more permanent injury, are sufficient to support a claim of excessive force," and rejected the plaintiff's complaint of pain and nerve damage as insufficient to establish the claim.

The Sixth Circuit would permit an excessive force claim stemming from tight handcuffs, but only when the officer had knowledge of the tightness and the arrestee was no threat. In *Walton v. City of Southfield*, 995 F.2d 1331 (6th Cir. 1993), the Court held that an excessive use of force claim could be premised on the officer handcuffing the prisoner if: first, the officer knew the prisoner had an injury; and second, if the officer also believed that the prisoner posed no threat. *Id.* at 1342. In *Neague v. Cynkar*, 258 F.3d 504 (6th Cir. 2001), the Court went further and held that handcuffing incident to a lawful arrest with no accompanying physical injury is insufficient to establish an excessive force claim. *Burchett v. Kiefer*, 310 F.2d 937, 944-45 (6th Cir. 2002) also held that tight handcuffing alone is insufficient to state a claim of excessive force, where the officers loosened the handcuffs a reasonable time after first being notified that they were too tight.

The Eleventh Circuit requires not only a showing of knowledge on the officer's behalf, but also something more than minimal injury. In *Rodriguez v. Farrell*, 280 F.3d 1341 (11th Cir. 2002), after a traffic stop, two police officers arrested the plaintiff pursuant to a valid warrant which, it turned out, was issued for a different individual. In the course of making the arrest, the plaintiff's arm was twisted behind his back and jerked up to his shoulder. *Id.* at 1351.

The plaintiff screamed. Unbeknownst to the arresting officer, the plaintiff had recently undergone significant orthopedic shoulder surgery. *Id.* As a result of the handcuffing, the plaintiff's internal surgical hardware was loosened, and a key bone fragment was displaced. *Id.* Over twenty-five surgeries followed in an attempt to correct the problem, which were ultimately unsuccessful and resulted in the plaintiff's arm being amputated below the elbow. *Id.*

In reversing the district court's denial of summary judgment, the Court first noted that "[p]ainful handcuffing, without more, is not excessive force in cases where the resulting injuries are minimal." *Id.* at 1351, *citing*, *Nolin v. Isbell*, 207 F.3d 1253 (11th Cir. 2000); *Brissett v. Paul*, 141 F.3d 1157 (4th 1998) (table); *Martin v. Gentile*, *supra*; *Silverman v. Ballantine*, 694 F.2d 1091 (7th Cir. 1982).

The Court then recognized that the plaintiff's surgery changed the situation, somewhat, by virtue of the negative consequences. "This case is different from *Nolin* because [plaintiff's] earlier surgery made what otherwise would have been a common non-excessive handcuffing technique (that ordinarily would be painful but cause minimal injury) a maneuver that caused severe injury and tragic results." *Rodriguez*, 280 F.3d at 1351.

This distinction, and the devastating injuries which resulted, was found by the Court to be legally irrelevant for purposes of determining whether excessive force was used:

> [N]o evidence has been presented that [the arresting officer] knew of plaintiff's recent elbow surgery or, more importantly, knew that handcuffing plaintiff would seriously aggravate

> plaintiff's preexisting condition. We do no use hindsight to judge the acts of police officers; we look at what they knew (or reasonably should have known) at the time of the act. What would ordinarily be considered reasonable force does not become excessive force when the force aggravates (however severely) a pre-existing condition the extent of which was unknown to the officer at the time.

Id. at 1351-53 (footnote omitted.)

Rodriguez's reliance on the knowledge of the officer in finding a potential cognizable claim is important, as in those instances where Courts have determined that tight handcuffs can lead to a viable excessive force claim, the officer's knowledge of the condition, and an unreasonable time thereafter to loosen the cuffs, has been cited as important consideration in establishing the presence of the claim, as has the question of whether the plaintiff violated the law or was resisting arrest. *See*, *e.g.*, *Kukla v. Hulm*, 310 F.3d 1046 (8th Cir. 2002) (denied qualified immunity, in part, because plaintiff committed no offense and did not resist); *Bastien*, 279 F.3d at 12-13 (reversing judgment for officer based on tight handcuffing for more than four hours, despite plaintiff's repeated complaints); *Kostrzewa v. City of Troy*, 247 F.3d 633, 639-40 (6th Cir. 2001) (officer documented that he had been able to tighten the cuffs to only the first tooth because the plaintiff had large wrists, yet he ignored plaintiff's persistent complaints that the cuffs were too small and tight until after the plaintiff was booked); *Heitschmidt v. City of Houston*, 161 F.3d 834, 839-40 (5th Cir. 1998) (reversing summary judgment for officers who ignored repeated complaints over a four-hour period and pointing out that the officers had no justification for refusing to adjust the painful

cuffs); *Martin*, 106 F.3d at 1310, 1313 (plaintiff's complaints that his hands were becoming numb and swollen and the officer's failure to adjust the handcuffs were sufficient to state a Fourth Amendment claim); *Alexander v. County of Los Angeles*, 64 F.3d 1315, 1323 (9th Cir. 1995) (officer failed to adjust handcuffs even though plaintiff complained of pain, alerted the officer that his medical condition necessitated adjusting the handcuffs, and the officer noted that the plaintiff's wrists were "mushy" when he applied the cuffs); *Greiner v. City of Champlin*, 27 F.3d 1346 (8th Cir. 1994) (no excessive force claim in violent handcuffing case where plaintiff resisted.). *See, also, Braun v. Baldwin*, 346 F.3d 761, 763 (7th 2003) (affirming summary judgment on excessive force/tight handcuffing case because no indication that "arrest was effected in an unusual or improper manner.")

Judge Smith's conclusion that there was no constitutional violation in this case was reached because Officer Tate had no notice that the cuffs were painfully tight. (22a-23a) The plaintiff in this case requested that the handcuffs be loosened and said they were tight, but it was not until he fell to the ground, groaned, and stated that he could not feel his hands that Officer Tate was on reasonable notice that the handcuffs were causing pain.

The Ninth Circuit's position in *Palmer*—that tight handcuffing can establish an excessive force claim—and Tenth Circuit's in *Hannula*—that not loosening tight handcuffs is not a constitutional violation—represent the two extremes. Other Courts have emphasized notice, injury and the severity of the injury as factors which must present in order for the claim to be cognizable.

Because there is such a fundamental difference of opinion among the various courts on this issue, this Court should grant the writ of certiorari to make the law consistent.

Clearly, this issue has great importance in the resolution of this particular case. If this Court were to conclude, for example, that the Tenth Circuit Court of Appeal's statement in *Hannula* that the failure to loosen handcuffs simply does not rise to the level of a constitutional violation was the correct view, or that the momentary delay in loosening the handcuffs was not objective unreasonable under *Graham*, because of a lack of notice that he was in pain, then Officer Tate's delay in attending to the plaintiff in this case could not establish a violation of the plaintiff's constitutional rights. He would be unquestionably entitled to qualified immunity.

> If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established.

Saucier, 533 U.S. at 201, 2156. However, resolution of this issue has an importance that extends beyond this particular case. This issue is one that is highly contentious, and which appears to be subject to a great deal of litigation. The sheer number of cases which have garnered appellate review and the varied approaches taken by the Courts of Appeals show this to be an issue of wide-ranging applicability. The fact that there are such significantly divergent rulings as to whether a constitutional claim can be based on tight handcuffs, and, if so, whether additional factors such as the

presence of severe injury are necessary to state such a claim, is indicative of the fact that this area of the law has become much too split, necessitating this Court's attention.

CONCLUSION

As such, the petitioner respectfully request this Honorable Court to grant its petition for writ of certiorari.

Respectfully submitted,

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